

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



To be argued by  
STUART D. WECHSLER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B  
P/S

**74-2053-4**

GEORGE KATZ,

Plaintiff-Appellee,

-against-

REALTY EQUITIES CORPORATION OF NEW YORK  
et al.,

Defendants-Appellees,

-and-

KLEIN, HINDS & FINKE and  
ALEXANDER GRANT & COMPANY,

Defendants-Appellants.

-----  
KENNETH I. HERMAN, Trustee  
F/B/O SHERIL ESTA KUPFER,

Plaintiff-Appellee,

-against-

REPUBLIC NATIONAL LIFE INSURANCE  
COMPANY et al.,

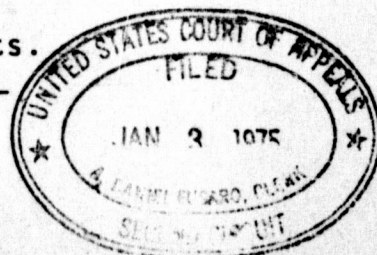
Defendants-Appellees,

-and-

KLEIN, HINDS & FINKE and  
ALEXANDER GRANT & COMPANY,

Defendants-Appellants.

(Cover Page 1)







ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS  
For the Second Circuit

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Docket No. 74-2053  
Docket No. 74-2054

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GEORGE KATZ,

Plaintiff-Appellee,

against

REALTY EQUITIES CORPORATION OF NEW YORK et al.

Defendants-Appellees,

and

KLEIN, HINDS & FINKE

and

ALEXANDER GRANT & COMPANY

Defendants-Appellants.

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F/B/O SHERIL ESTA KUPFER,

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ALEXANDER GRANT & COMPANY

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BRIEF FOR PLAINTIFFS-APPELLEES

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### PRELIMINARY STATEMENT

This appeal arises from an Order of Consolidation of Honorable Milton J. Pollack dated June 24, 1974 (the "Order") (107a).<sup>1</sup> The Order consolidated twelve actions (the "Related Actions") that were previously brought in the Southern District of New York concerning various transactions entered into between Realty Equities Corporation of New York ("Realty") and Republic National Life Insurance Company ("Republic"). The Order further provided that plaintiffs file and serve a consolidated complaint, supplemented and amended, upon all of the defendants in the twelve separate Related Actions. Two of the defendants named in the Related Actions are the accounting firms of Klein, Hinds & Finke ("KHF") and Alexander Grant & Company ("Grant").

### QUESTION PRESENTED

Did the District Court exercise proper discretion in consolidating the Related Actions?

### STATEMENT OF THE CASE

In early 1974 disclosures of certain financial relationships between Republic and Realty were made public.

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<sup>1</sup> References in this form are to the Appendix.

On February 7, 1974 Joseph L. Massie filed an action in the United States District Court for the Northern District of Texas against Republic (74 Civ. 3782). On March 8, 1974 the Securities and Exchange Commission ("SEC") filed a complaint in the United States District Court for the Southern District of New York (74 Civ. 1097) against Realty, Republic and others. Thereafter sixteen (16) other actions were filed all of whose basic allegations centered around the transactions entered into between Republic and Realty.<sup>2</sup> Grant and KHF were named in four

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<sup>2</sup> The sixteen other actions are Miller v. Republic National Life Insurance Company, et al. 74 Civ. 1115; Herman v. Republic National Life Insurance Company, et al. 74 Civ. 1248; Katz v. Realty Equities Corporation of New York, et al. 74 Civ. 1137; Cohn, et al. v. Realty Equities Corp. of New York, et al. 74 Civ. 1192; Sussman, et al. v. Republic National Life Insurance Company, et al. 74 Civ. 1225; Rubenstein v. Republic National Life Insurance Co., et al. 74 Civ. 1255; Ferber v. Beasley, et al. 74 Civ. 1294; Tisser v. Karp, et al. 74 Civ. 1662; Freeman, etc. v. Republic National Life Insurance Co. et al. 74 Civ. 1668; Chesner v. Karp, et al. 74 Civ. 1846; Gottlieb, etc. v. Realty Equities Corporation of New York, et al. 74 Civ. 1875; and Asarian v. Karp, et al. 74 Civ. 1942. All of the above were filed in the Southern District of New York. The three other actions commenced in the Northern District of Texas are Garrett etc. v. Republic National Life Insurance Company, et al. 74 Civ. 3783; Miller v. Republic National Life Insurance Company, et al. 74 Civ. 3784; and Flamm v. Beasley, et al. 74 Civ. 3785. The action commenced in the Middle District of Tennessee is Synercon Corporation v. Republic National Life Insurance Company 74 Civ. 3781.

of the related actions: Katz v. Realty Equities Corporation of New York, et al. (the "Katz Case") 74 Civ. 1137; Herman v. Republic National Life Insurance Company, et al. (the "Herman Case") 74 Civ. 1248; Chesner v. Karp (the "Chesner Case") 74 Civ. 1846; and Asarian v. Karp (the "Asarian Case") 74 Civ. 1942. The Katz case and the Chesner case were brought as class actions on behalf of the stockholders of Realty. The Herman case was brought as a class action on behalf of the stockholders of Republic. The Asarian case was brought derivatively on behalf of Realty.

On June 12, 1974 the District Court, sua sponte, held a hearing with respect to determining procedure concerning the twelve Related Actions filed in Southern District of New York (77a). On June 24, 1974 the Order was filed and the twelve Related Actions filed in the Southern District were consolidated for pre-trial purposes.

On August 22, 1974, the Judicial Panel on Multi-District Litigation ordered the transfer to the Southern District of New York of five actions which were pending in the Northern District of Texas and the Middle District of Tennessee (242a). Thereafter on August 26, 1974, sua sponte, Judge Pollack ordered that these five additional actions be consolidated with those previously consolidated (250a).



On September 10, 1974 a consolidated complaint was served upon all of the defendants including Grant and KHF. Thereafter, on October 15, 1974, an amended consolidated complaint (the "Complaint") was served (126a).

The Complaint is brought by twenty-one plaintiffs against thirty-nine defendants, representing all of the parties named in the Related Actions.<sup>3</sup> The Complaint is brought on behalf of the shareholders of Republic; shareholders of Realty; holders of Realty's 6% subordinated debentures; holders of the stock of Pacific National Life Insurance Company at the date it was merged into Republic; holders of the stock of Mercantile Security Life Insurance Company. at the time it was merged into Republic; Synercon Corporation; derivatively on behalf of Republic; and derivatively on behalf of Realty.

The Complaint seeks to recover damages resulting from the transactions entered into between Republic and Realty and is based on the Securities Act of 1933 15 U.S.C.

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3 Homer Chapin was named in the Herman Case. A motion was made on behalf of Mr. Chapin for an order of dismissing the complaint as against and such motion was consented to by plaintiff Herman. James Coonan was named in *Ferber v. Beasley*, supra. Mr. Coonan made a motion to dismiss the complaint which was granted pursuant to a stipulation.

§ 77a et seq.; the Securities Exchange Act of 1934 15 U.S.C. § 78a et seq. (the "Exchange Act"), the Rules and Regulations promulgated thereunder 17 C.F.R. § 240, the Trust Indenture Act of 1939, 15 U.S.C. 77aaa et seq.; the Texas Business and Commerce Code and principles of common law.

Grant and KHF are named in counts asserting violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by (a) the shareholders of Realty, (b) the shareholders of Republic and (c) derivatively on behalf of Realty.<sup>4</sup>

Prior to September 1, 1969, KHF was the independent auditor for Realty and after KHF was combined into Grant, Grant continued on as its independent auditor until the autumn of 1970.

The Complaint alleges that Grant and KHF aided and abetted in certain violations of Rule 10b-5 and Section 10(b) in connection with some of the financial transactions between Realty and Republic. The Complaint alleges that Grant and KHF discovered or knew of certain material problems relating to Republic's investment in Realty and that they breached a duty to the investing public and the SEC in failing to disclose those problems.

Grant and KHF contend that the Order seriously prejudices them in that the claims asserted against the other

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<sup>4</sup> Counts VII, XIX, XXI.

defendants are far broader and from different classes than those alleged against them in the Related Actions in which they are named. In addition, Grant and KHF contend that the Order dictates that they defend themselves not only from those claims asserted in the Katz Case and the Herman Case but also against cross-claims for contribution and indemnification from all of the other defendants.

Plaintiffs respectfully submit that Grant and KHF have not been prejudiced by the Order so as to dictate a severance from the rest of this consolidated litigation. All of the plaintiffs and their counsel have read and approved the consolidated complaint and the Amended Consolidated Complaint. Accordingly, all of the plaintiffs have affirmatively decided whether or not they wished to pursue claims against Grant and KHF.<sup>5</sup>

With respect to the argument of preparing a defense against the claims asserted against it, it must be noted that the Related Actions have presently been consolidated for pre-trial purposes only.

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<sup>5</sup> Plaintiffs Sy Sussman and Ruth Sussman have directed liaison counsel to assert claims on their behalf only against those defendants named in their complaint.

### ARGUMENT

THE DISTRICT COURT EXERCISED PROPER  
AUTHORITY IN CONSOLIDATING THE RELATED  
ACTIONS AND ORDERING THE FILING OF A  
CONSOLIDATED COMPLAINT.

The threshold issue presented on this appeal is whether the District Court exercised proper authority by directing a consolidation of the Related Actions and the preparation and serving of a consolidated complaint.

Rule 42(a) of the Federal Rules of Civil Procedure ("FRCP") provides:

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

It is settled law that the exercise of FRCP Rule 42(a) is discretionary with the District Court. Lewis v. Baltimore & L.R.R. 62 Fed. 218 (CCA 4th 1894); McLaughlin v. Blidberg Rothchild Co. 156 F. Supp. 379 (SDNY 1957); Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (SDNY 1959) appealed dismissed, 273 F. 2d 729 (CA 2d 1959); Transmirra Products v. Monsanto Chemical Co., 27 F.R.D. 482 (SDNY 1961); and Journapak Corp. v. Blair, 27 F.R.D. 509 (SDNY 1961). Moreover, such discretion can be exercised on the District Court's own motion. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892).

The Supreme Court set forth the basic criteria with respect to consolidation in Johnson v. Manhattan Railway Company, 289 U.S. 479 (1933)

"[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." (pp. 496-97).

Authority to a similar effect can be found in: Garber v. Randell, 477 F. 2d 711 (2d Cir. 1973); Zdanok v. Glidden Co., 327 F. 2d 944 (2d Cir.) cert. denied, 377 U.S. 934 (1964); Greenberg v. Giannini, 140 F. 2d 550 (2d Cir. 1944); Journapak Corp. v. Blair, supra.

The logic behind FRCP 42(a) and the cases decided thereunder has never been more manifest than in the consolidation of the seventeen actions stemming from the Republic-Realty transactions. All of the complaints arise out of the Republic-Realty transactions, the relief sought is similar; and the defendants are named with varying degrees of repetition. Without consolidation, all litigants would incur enormous expense and the progress of this matter towards a final determination will undoubtedly be delayed.<sup>6</sup>

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<sup>6</sup> Under consolidation, plaintiffs have conducted extensive document discovery including inspection of documents in the possession of Alexander Grant & Co. In addition, numerous depositions have been taken of various defendants in Garrett v. Republic National Life Insurance Company, et al, supra, which depositions are to be used in connection with the consolidated litigation.

Grant and KHF rely strongly on this Court's recent decision in Garber v. Randell, supra as being dispositive in their favor with respect to the issue presented on this appeal. In Garber, the District Court held that three class actions be consolidated for pre-trial purposes and in this regard, ordered that a consolidated complaint be filed. The related actions in Garber stated numerous counts against National Student Marketing Corp., its officers, directors, accountants, attorneys and others for violation under the federal securities laws. One such defendant, the law firm of White & Case ("W&C") was a defendant in only one of the related actions. W&C appealed the consolidation order. This Court held that the consolidation was improper and prejudicial to W&C.

In rendering its decision, this Court noted that the claims asserted against W&C were "on behalf of only one of the fifteen plaintiffs". 477 F. 2d at 716. Moreover, this Court made note of the fact that some of the plaintiffs were not in accord with respect to the count asserted against W&C:

"Furthermore, at least some of the plaintiffs have disassociated themselves from [the] claims against W&C. In a letter to this Court dated November 22, 1972, Harry H. Lipsig, writing on behalf of himself and the other five Lipsig plaintiffs, states 'Neither I nor any of the other Lipsig plaintiffs intend to assert any claims...against White & Case or Lord, Bissell & Brook' and 'The Lipsig plaintiffs...

do not desire to have their claims brought against the other defendants consolidated or otherwise merged or combined with claims that other stockholders might wish to assert against those lawyer defendants.'" (p. 716)

In the instant consolidated matters, only two of the plaintiffs directed that allegations on their behalf be limited to those defendants named in their complaint. Accordingly, unlike the related actions in Garber, the plaintiffs have affirmatively decided to assert claims against KHF and Grant. In this regard, the argument that the plaintiffs in the Related Actions have expanded their claims by way of the consolidated complaint is of no moment in view of the fact that those plaintiffs would be entitled to amend their complaint.

In Fritsch v. District Council No. 9, Bro. of Painters, Etc., 335 F. Supp. 854 (SDNY 1971) the District Court ordered consolidation of two lawsuits commenced under the Labor Management Reporting and Disclosure Act of 1959. In ordering consolidation, the District Court dismissed an argument couched in terms similar to those argued by Grant and KHF by saying:

"That the complaint...contains issues beyond the question raised in the instant complaint is not sufficient reason to deny the motion for consolidation...[B]y avoiding duplication of litigation on the issues that are common to the two cases, consolidation will save useful time for the Court and for [defendants]". (p.856)




See also: 5 Moore's Federal Practice Section  
42-02 (p. 42-15 2d Ed. 1973).

In the instant case, the allegations made  
on behalf of the various plaintiffs are for the most part  
similar. If Grant and KHF feel that their connection  
with the Amended Consolidated Complaint is remote or  
peripheral, their proper course of action should be a motion  
to dismiss under Rule 12 of the Federal Rules of Civil  
Procedure. KHF and Grant should not be permitted to  
impede the progress of this lawsuit by means of this  
appeal.

CONCLUSION

THE APPEAL OF GRANT AND KHF SHOULD BE  
DENIED AND THE ORDER OF CONSOLIDATION  
SHOULD BE AFFIRMED.

Respectfully submitted,

  
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Dated: New York, New York  
January 3, 1975

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
GEORGE KATZ,

Plaintiff-Appellee,

- against -

REALTY EQUITIES CORPORATION OF NEW  
YORK, et al.,

Docket Nos.

74-2053

74-2054

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and

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AFFIDAVIT OF  
SERVICE

Defendants-Appellants.

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F/B/O SHERIL ESTA KUPFER,

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and

KLEIN, HINDS & FINK and ALEXANDER  
GRANT & COMPANY,

Defendants-appellants.

-----X  
STATE OF NEW YORK )  
COUNTY OF NEW YORK)ss.:

CAROL TURNER, being duly sworn, deposes and says: that  
deponent is not a party to the action, is over 18 years of age  
and resides at 452 Beach Avenue, Bronx, New York. That on the  
3rd day of January, 1975, deponent served the within Plaintiffs-  
Appellees Brief on each of the parties to the above numbered and

styled cause by mailing two copies of the same to said parties or their counsel as described on the annexed Schedule.

Sworn to before me this 3rd day of  
January, 1975.

Carol Luxer

Loretta O'Brien

Notary Public

LORETTA O'BRIEN  
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No. 41-6170-50  
Qualified in Queens County  
Commission Expires March 30, 1976

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